That there is not and was not at any of the times herein mentioned a State prohibition law in New York State. That New York State troopers have been and are actively engaged, under orders of the Governor of the State, in aiding to enforce the National Prohibition Act, as part of their official duties, and under authority granted to them "or any officer of the law" by Section 26 of Title II of said act. That said State troopers have been advised by, and customarily follow instructions by, Federal officers as to how to proceed in prohibition cases; and have a general understanding and arrangement with said Federal officers, whereby said State troopers customarily turn the property seized and the persons arrested over to Federal authorities. That a part of their instructions are that they do not need any search warrants. Thus, while claiming to act officially as authorized Federal agents in the enforcement of Federal law, they claim also the right to search and seize *ad libitum*, without being subject to the restraining influence of the Federal Constitution, because they are also State officers.

That on October 1, 1924, at 1 p. m., petitioners were riding southward toward Massena, N. Y., on the State highway in a Buick roadster, owned and driven by said petitioner Gambino. That they stopped in front of the Reno Garage at Massena, N. Y., so that petitioner Lima might go to the men's room. That immediately thereafter State troopers Carroll and Travis came up in a Ford car and demanded that petitioner Gambino open the rear compartment of his car, so that same might be searched by said officers of the law. The de-

mand was refused, and said State troopers thereupon falsely arrested both of the petitioners, and seized said car, without any warrant, and upon mere suspicion that the same might be carrying intoxicating liquor, in violation of the National Prohibition Act. That said troopers took petitioners and said car to the police station at Massena. That said officers then opened the rear compartment of said car, and claimed to have found therein 14 cases of Canadian ale. They also searched the persons of petitioners and found on each a loaded revolver, together with a lawful permit to possess and carry same. Said troopers then turned over the property seized, and the men arrested, to Federal agent Robillard. That petitioners were then taken before a local U. S. Commissioner, and arraigned upon the charges of illegally possessing and transporting intoxicating liquor, to wit: the alleged Canadian ale found in the Buick car, as aforesaid.

At the October term of the U. S. District Court for the Northern District of New York petitioners moved for the return of the property unlawfully seized, and to restrain the use of evidence unlawfully obtained by said State troopers, through the false arrest of the petitioners, and the illegal search and seizure, as aforesaid. The motions were denied, and the petitioners were arraigned and pleaded not guilty before the court upon the charges, as aforesaid.

The petitioners were rearraigned on said charges several times, and urged by the prosecuting attorney and prohibition agents to have one of them at least

ing to act in their official capacity for the purpose of enforcing the Volstead Act, are justified in making unwarranted searches and seizures upon mere suspicion, or whether they must have probable cause for believing that the law is being violated; the question whether citizens may be lawfully convicted of constructive crimes; whether they may be so convicted solely on evidence which is equally consistent with the theory of innocence as with the theory of guilt; and whether citizens must either defend their constitutional rights against unwarranted search, seizure and arrest by officers of the law, with force and arms, or else abandon them.

The grounds upon which it is insisted that the judgment of the circuit court of appeals should be reversed are: That the said court has here decided important questions of Federal law in a way probably untenable, in conflict with the weight of authority, and in conflict with applicable decisions of this Court; because—

(*a*) Said officers of the law were authorized by Section 26 of Title II of the National Prohibition Act to act as Federal agents in making such search, seizure and arrest in proper cases, and were acting under color of such authority solely for the purpose of enforcing Federal law in the instant case.

(*b*) While acting as Government agents in the enforcement of Federal law, without any warrant or authority in law, without probable cause, and upon mere suspicion, they made the

said search, seizure and arrest, in violation of defendant's constitutional rights, as aforesaid.

(*c*) There is not any evidence to support the conviction of conspiracy, except such as might be constructed from evidence which was equally as consistent with the theory of innocence as with the theory of guilt.

as more fully appears in petitioners' brief hereto annexed.

Your petitioners believe that the aforesaid judgment of the circuit court of appeals is erroneous, and that this honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein, entitled Rosario Gambino and Joseph Lima, plaintiffs in error, *vs.* United States of America, defendant in error, No. 9229, to the end that the said case may be reviewed and determined by this Court, as provided in Judicial Code, Sec. 240, or that your peti-

tioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court of appeals in the said case, and every part thereof, may be reversed by this honorable Court.

And thus your petitioners will ever pray.

ROSARIO GAMBINO,
JOSEPH LIMA,
Petitioners.
IRVING K. BAXTER,
Attorney for Petitioners.

There was no formal opinion written by the trial judge.

The preliminary motions and trial were before the Honorable Frank Cooper, judge of the United States District Court for the Northern District of New York. He announced orally that there seemed to be "reasonable grounds of suspicion" on the part of the State troopers.

This announcement does not appear in the printed record. However, on page 30 of the printed record, in overruling an objection to some evidence by the defendants, the court said,

> "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the jury will understand the objection is overruled."

Judgment to be Reviewed.

Motion for return of property and to quash evidence (R., 24 and 26).

Motion denied (R., 26).

Motion to direct a verdict of not guilty on each of the counts, on the grounds that there was no legal evidence upon which a verdict of guilty might properly be based, because all of the evidence offered had been obtained by means of the false arrest and unlawful search and seizure, in violation of the Fourth and

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Opinion of the court	9
Judgment to be reviewed	9
Claims and rulings	10
Statutory provisions as to jurisdiction	14
Cases to sustain jurisdiction	15
Statement of the case	15
Specification of assigned errors	23
Summary of argument	26
Argument	28
Point I. New York State troopers, as officers of the law, are authorized and directed to enforce the National Prohibition Act by Section 26 of Title II of said act in the same manner and to the same extent as officers paid by the Federal Government	28
Point II. This arrest, search, and seizure were made for the purpose and with the intent of enforcing the National Prohibition Act	29
Point III. This false arrest and illegal search and seizure were made without warrant or authority in law, without probable cause, and upon mere suspicion, by authorized agents of the Federal Government, for the purpose of enforcing Federal law	34
Point IV. The restrictions of the Fourth and Fifth Amendments to the Constitution of the United States apply to any exercise of the power of the Government through any of its authorized agencies.	37
Point V. There was not any evidence in the case to support the conspiracy charge	45

Table of Cases Cited.

On Argument.

Adams v. New York, 192 U. S., 585	39
Boyd v. United States, 116 U. S., 616	38
Carroll v. United States, 45 S. Ct., 280	42

Page

Davidson et al. v. United States, 247 Fed., 285 47
Gouled v. United States, 255 U. S., 298 41
Stafford et al. v. United States, 300 Fed., 537 48
United States v. Story, C. C. A., 5th Circuit, 294 Fed., 517 28
Weeks v. United States, 232 U. S., 383 33
Winsor v. United States, 286 Fed., 51 ..... 47, 49

On Jurisdiction.

Cameron v. United States, 231 U. S., 710 15
Mecanno, Limited, v. John Wanamaker, N. Y., 253 U. S., 136 .. 15

STATUTES CITED.

Judicial Code of U. S., Sec. 240 (a) 14
National Prohibition Act, Title II, Secs. 2 and 26 28
Revised Statutes of U. S., Sec. 1014 29

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

ROSARIO GAMBINO AND JOSEPH LIMA,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Rosario Gambino and Joseph Lima, respectfully represent that they are citizens of the United States, residing in the city of Utica, N. Y., and are the plaintiffs in error in the above-entitled matter.

plead guilty to said charges, but each steadfastly declined to so do.

The cause was moved for trial before the district court, at a stated term, held in the city of Syracuse, N. Y., on the 15th day of May, 1925. The petitioners again moved to restrain the use of evidence unlawfully obtained, as aforesaid, and for the return of the property unlawfully seized. The motions were again denied, and the case ordered to proceed to trial. The prosecuting attorney then announced that an indictment had been found against petitioners charging them: First, with conspiracy to violate the National Prohibition Act, and the customs laws of the United States, by unlawfully possessing and transporting and bringing into the United States said alleged intoxicating liquor; Second, with smuggling, by bringing in said alleged Canadian ale from Canada; Third, with illegally possessing said alleged intoxicating liquor, and Fourth, with illegally transporting same. The arraignment of petitioners on said indictment was waived or conceded. The only evidence offered was that which had been procured through the unlawful arrest, search and seizure, as aforesaid; and the same was admitted over objection and exception of petitioners that it had been obtained by officers of the law while acting for the purpose of enforcing the National Prohibition Act, in their official capacity, but without warrant or authority in law, and in violation of petitioners' constitutional rights, as guaranteed by the Fourth and Fifth Amendments to the Constitution of

the United States. The trial court dismissed the second count, smuggling. The jury rendered a verdict of guilty on the others, and the court sentenced petitioners on the 27th day of May, 1925, to be confined in the Federal prison at Atlanta for one year and one day each, and to pay a fine of $10,000 each on the conspiracy charge, and nothing on either of the other charges.

The case was reviewed on writ of error by the Circuit Court of Appeals for the Second Circuit, and judgment of the district court was affirmed without opinion on the 21st day of January, 1927 (R., 91). Yet it was urged by the plaintiff in error that these acts of these officers of the law were admittedly not their individual misconduct, nor incidental to some other or lawful procedure, but were official acts of authorized agents of the Federal Government, for the avowed purpose of enforcing Federal law; and that the constitutional restrictions therefore do apply. That admittedly there were no facts or circumstances known to the seizing officers to constitute probable cause for making this unwarranted seizure. That the most that had been claimed, in the attempted justification before the trial court, was that they had reasonable grounds to suspect that the automobile contained intoxicating liquor.

The questions represented by the assignments of error in this cause are of broad general interest to officers of the law and to the people. They involve the right of State officers to arrest, search, or seize for violation of the National Prohibition Act in any case. The question as to whether officers of the law, purport-

Fifth Amendments to the Constitution. Motion granted as to Count 2, smuggling. Other motions denied (R., 64-66).

Jury rendered verdict of guilty as charged against both petitioners on Counts 1, 3, and 4 (R., 81). The court then pronounced judgment as follows:

> "The sentence and judgment of the court is that each of these defendants be confined in the United States Penitentiary at Atlanta, Georgia, for one year and one day, and that they be fined in addition thereto the sum of $10,000 each. Now, if they have any property I would not fine them $10,000, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the penitentiary, Atlanta, Georgia, to be after the expiration of the prisoners' sentence, and the court will grant your writ of error bill, and bail is fixed at $5,000 each, and, as I understand, you have bondsmen here" (R., 82).

"Per Curiam:

"Judgment of conviction affirmed" (R., 91).

Judgment of the United States Circuit Court of Appeals for the Second Circuit. Filed January 21, 1927 (R., 91).

Claims and Rulings.

On their preliminary motions petitioners claimed that the acts of the State troopers in making this false arrest and the unwarranted and unlawful search and

seizure for violation of the Volstead Act must be deemed to be the acts of Federal agents. That, therefore, the search and seizure by said State policemen, without any warrant or authority in law, came under the prohibitions of the Fourth and Fifth Amendments to the Constitution of the United States. That the property seized should be ordered returned, and the evidence so obtained should be quashed (R., 24-25). The trial court denied the motions, holding substantially that the arrest and the subsequent search and seizure were justified because the officers had "reasonable grounds for suspicion."

The evidence unlawfully obtained, as aforesaid, was used on the trial, and the convictions based thereon, over appropriate objections and exceptions.

At the review on writ of error by the circuit court of appeals, petitioners claimed in printed brief and oral argument—

That State officers are authorized to enforce Federal law by Section 1014, R. S. of U. S.

That any officer of the law is authorized and directed to enforce the Volstead Act, by Section 26 of Title II of said act.

That these officers of the law admittedly acted solely for the purpose of enforcing the Volstead Act, by order of their superior officers, and followed literally the directions of said act, instantly after making the unlawful search.

That they acted as per instructions on how to proceed in Volstead cases received from Federal prohibi-

tion enforcement headquarters, and under a general prearrangement between State authorities and Federal authorities, whereby New York State troopers customarily participated in the enforcement of the Volstead Act as part of their official duties.

Some of the judges announced orally that that court had decided in Schroeder *vs.* U. S., 7 Fed. Rept. (2d), 60, that the constitutional amendments were not applicable to searches by State officers, and that, therefore, the question was no longer open.

In reply it was claimed that in the case at bar the State officers both claimed to, and did, act under Federal authority such as would make the amendments applicable; and the Schroeder case, *supra*, was clearly distinguished. Applicable decisions of the United States Supreme Court were cited in support of the claim; none were cited against it. The United States Attorney for the Northern District of New York stated that his office considered it a mooted question, which they would like to have settled. That the petitioners were falsely arrested upon mere suspicion, and falsely imprisoned in the Massena jail. That the automobile was then opened and searched, and the persons of petitioners searched, in violation of their constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of their liberty or property without due process of law, and to not be compelled to give evidence against themselves. That substantially all of the evidence presented at the trial had been thus obtained, and that such evidence could not lawfully be

used against the petitioners or either of them in criminal prosecution.

That there was not any evidence to support the charge of conspiracy. That no claim was made at the trial that either of petitioners attempted to escape. That, while one of the arresting officers testified that petitioner Lima ran into the garage, yet the other officer testified that he walked into same. That the actual testimony at the trial showed that he had gone into the men's room. That the officer who followed him in had no difficulty in finding him, and that there was not any question of any attempt at either resistance or escape.

That neither of petitioners made any admissions of any kind at any time.

That both officers testified that both petitioners protested the entire innocence of petitioner Lima at the time of the arrest.

That the trial court had erred in admitting, as evidence of conspiracy, testimony that one of the petitioners was carrying a revolver, and that the other was carrying a pistol; because each was also carrying a lawful permit, issued by a court of record, to carry same. That the carrying of such arms was therefore lawful procedure, and not evidence of any crime; and that there was not any evidence that either of petitioners had made, or attempted to make, any improper use of such arms.

That, even if the evidence obtained by the unwarranted search and seizure might lawfully be used, it

could only justify the conviction of petitioner Gambino on the possession and transportation counts, he being the owner and driver of the car.

That there was not any evidence of any kind against petitioner Lima of any offense, beyond merely the fact that he was riding in Gambino's car; and that such evidence was consistent with the theory of innocence, as well as with the theory of guilt, and was therefore insufficient as a basis for any verdict against him. That the prosecution had not shown any concert of action in the commission of an unlawful act, or other facts and circumstances from which the natural inference would arise that the unlawful act of transporting was in furtherance of a common design, intent and purpose of the alleged conspirators. That, accordingly, there was not any evidence to support the charge of conspiracy against either of the petitioners.

But the circuit court of appeals, nevertheless, affirmed without opinion.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Sec. 240(*a*) of the Judicial Code of the United States, which provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by

it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The following cases are believed to sustain the jurisdiction of this Court:

Cameron *vs.* United States, 231 U. S., 710.

Meccano, Limited, *vs.* John Wanamaker, New York, 253 U. S., 136.

Statement of the Case.

On August 1, 1924, at 1 p. m., the petitioners were riding southward toward Massena, N. Y., on the State highway in a Buick roadster, owned and driven by petitioner Gambino. As they came into Massena they stopped in front of the Reno Garage, owned and operated by N. A. Santamour and at which George Aubrey was employed. Petitioner Lima got out of the car and went into the men's room at said garage. Immediately thereafter New York State Troopers Carroll and Travis came up in a Ford car. Trooper Carroll asked Gambino for his registration card, and was shown same. He then demanded of petitioner Gambino to open the rear compartment of the car. He refused to do so. Said officer then asked Santamour for keys to open said rear compartment, and was told that he did not have any keys for same. Said officer then attempted to question petitioner Gambino as to what was in the rear compartment of his car and petitioner declined to state. The officer was then asked if he had a search warrant, and replied that they did not have any.

Meanwhile, officer Travis had gone into the garage, and came back with petitioner Lima. Petitioner Lima was also questioned as to what was in the rear compartment of said car, and replied that he did not know. Said officers thereupon, and without further ado, falsely arrested both of the petitioners and took them and Gambino's car to the police station at Massena (R., 24, 25, 26).

The petitioners moved on their verified petition and supporting affidavits by N. A. Santamour and George Aubrey, before the United States District Court on the 27th day of October, 1924, for the return of the property unlawfully seized as aforesaid. The said petition and affidavits stated the facts substantially as hereinbefore recited. The petition further alleged that the seized property and the persons of petitioners were turned over by said State officers to Federal officers for prosecution in Federal Court for alleged illegal possession and transportation of intoxicating liquor, to wit: beer. That said Federal officers were proposing to use evidence obtained by means of the said false arrest and illegal search and seizure by said State troopers against these petitioners at the proposed trial in the United States District Court on said charges, and in proceedings to have petitioners' property confiscated (R., 25).

That said false arrest, search and seizure were made by said officers for the purpose of enforcing the National Prohibition Act, under color or authority granted to said officers by Section 26 of Title II of said act. That said false arrest, search and seizure

as aforesaid were made in violation of petitioners' constitutional rights, to be secure from unreasonable searches and seizures, to not be deprived of their liberty or property without due process of law, and to not be compelled to give evidence against themselves, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. Wherefore petitioners moved for an order directing the return to petitioners of the property unlawfully seized and held from them as aforesaid by said State troopers and said Federal officers, and for an order forbidding and restraining the use of the evidence so obtained against either of the petitioners or their property.

The foregoing preliminary petitions and motions were argued in behalf of the petitioners by S. J. Capecelatro as counsel. No stenographic record was taken of these proceedings. The petitioners were, on various occasions, recalled before the United States District Court and re-arraigned, at which times the prosecuting attorney suggested that a plea of guilty be entered by one at least of petitioners in settlement of the matter; but the petitioners, and each of them, steadfastly declined to plead guilty to any charge. The case was moved for trial on the 15th day of May, 1925, at which time Irving K. Baxter, Esq., appeared as counsel for the petitioners. The defendants again moved to restrain the use of evidence unlawfully obtained as aforesaid, and for the return of property unlawfully seized as aforesaid, upon all the grounds and upon all the papers theretofore offered in support of said motions (R., 26). A copy of an answering

affidavit by J. T. Carroll was then served upon counsel for the defendants, which alleged in substance "that said affiant, J. T. Carroll, New York State policeman, in company with Trooper Travis, were traveling on the highway from Massena, N. Y., to Hogansburg, N. Y., in an automobile on the first day of August, 1924. 'That they met a Buick roadster, which was loaded very heavily. That deponent noticed that the license plates were from a county in the central part of the State. That these facts, together with the fact that the car was heavily loaded and was traveling at a speed of about twenty-five or thirty-five miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor. That deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick roadster. That said Buick roadster was being driven at that time by Rosario Gambino, and the occupant was Joseph Lima. That these two were placed under arrest at this time. Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal officers' " (R., 27-28).

The court again denied the motions, ordered a jury drawn, and the case to proceed to trial. The prosecuting attorney then stated that the defendants had been indicted on four counts, to wit: first, Conspiracy to violate the National Prohibition Act and the customs laws of the United States by unlawfully importing

into and transporting through the State and Northern District of New York large quantities of intoxicating liquor. Second, smuggling by bringing in said Canadian ale from Canada to the Northern District of New York unlawfully. Third, illegally possessing said intoxicating liquor. Fourth, illegally transporting said intoxicating liquor. The prosecuting attorney then stated that he was not sure whether or not the defendants had been arraigned and had pleaded to said indictments. Counsel for the defense then stated that the defendants would waive or concede the arraignment on condition that the preliminary motions and procedure were to apply to the indictment and evidence offered thereunder with the same force and effect as to the original information, and the case then proceeded to trial.

To maintain its case the Government offered evidence by Troopers Carroll and Travis substantially as set forth in the answering affidavit of J. T. Carroll, as aforesaid; and same was received over constitutional objections and exceptions, as aforesaid. Trooper Carroll also testified in addition, while on the witness stand, that immediately before making the arrests he lifted the rear end of the defendants' car and let it drop and heard bottles rattle. In this addition this witness was neither corroborated by the other arresting officer, nor even by his own affidavit as offered in opposition to the preliminary motions. Also, the verified petition of the defendants, and the supporting affidavits by N. A. Santamour and George Aubrey, substantially contradicted this testimony.

Trooper Carroll also testified that Gambino asked him if he couldn't fix it up, and he told him "No, of course not" (R., 38). This testimony by Carroll, also, was not corroborated in any way. This witness also testified that the place at which the arrests were made was known to him as Rayno's garage. That Frank Rayno was proprietor of the same, and had the reputation of being a bootlegger (R., 31). In this addition to his testimony this witness was not corroborated in any way, but was flatly contradicted by the affidavits of N. A. Santamour and George Aubrey, showing that the place was known as "the Reno Garage, of which Santamour was the proprietor and said Aubrey was an employee" (R., 25). In overruling the objections of petitioners to this evidence, that same was irrelevant and highly prejudicial to defendants, the court said:

> "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the jury will understand the objection is overruled" (R., 30).

It is thus seen that the trial court, in overruling the preliminary motions, erroneously held "that reasonable grounds to suspect" that the automobile contained intoxicating liquor was justification for the false arrest, and the subsequent unwarranted search

and seizure while petitioners were being falsely imprisoned; and that it also erroneously permitted incompetent and highly prejudicial evidence to be heard by the jury, over appropriate objections and exceptions. Each of these errors were assigned and urged as grounds for reversal before the lower court.

Troopers Carrol and Travis further testified that they had seized at the police station a revolver with cartridges from one defendant, and a pistol with cartridges from the other defendant, over objections and exceptions; the trial court ruling "That these things are competent evidence upon one of the charges in the case, namely, the question of conspiracy;" and overruled defendants' objections, to which ruling of the court the defendants, by their counsel, then and there duly excepted (R., 36).

The only further evidence offered by the prosecution was that of the Federal officers who had received the property seized as aforesaid, to wit: the automobile, the 15 cases of alleged beer found therein on search by said State officers at the police station after petitioners had been falsely arrested and while they were being falsely imprisoned; and the firearms seized from the persons of the petitioners as aforesaid; and there was also offered the testimony of the chemist that he had analized said beer and found the same to contain more than the lawful alcoholic content.

On cross-examination it was shown that, at the time the firearms were seized from the defendants, there were also seized proper permits from courts of record

showing the petitioners were lawfully entitled to carry same.

The prosecution then rested. The defendants offered no evidence and the case was closed.

The defendants moved to direct a verdict of not guilty on each of the four counts of the indictment, on the grounds that the evidence was insufficient to warrant a verdict against either of the defendants on any of said counts; and that such evidence as was submitted had been illegally obtained in violation of the defendants' constitutional rights, and could not, therefore, be lawfully used against either of them. The court granted the motion as to count two, smuggling; but denied the motions as to counts one, conspiracy; three, possession, and four, transportation.

The jury rendered a verdict finding both defendants guilty on all of said first, third and fourth counts.

Thereupon the court pronounced judgment upon the verdict and sentenced the defendants as follows:

> "The sentence and judgment of the Court is that each of these defendants be confined in the United States Penitentiary at Atlanta, Ga., for one year and one day and that they be fined in addition thereto the sum of ten thousand dollars each. Now, if they have any property I would not fine them ten thousand dollars, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the pentitentiary, Atlanta, Ga., to be after the expiration of the prisoners' sentence, and the Court will grant your writ of

error bill and bail is fixed at five thousand dollars each, and as I understand you have bondsmen here" (R., 82).

The case was reviewed on writ of error by the Circuit Court of Appeals for the Second Circuit and judgment was rendered on the 21st day of January, 1927, affirming the judgment of the district court, without opinion.

Specification of Assigned Errors Intended to be Urged.

1. The trial court erred in denying the preliminary motions of the petitioners to restrain the use of evidence unlawfully obtained through the false arrest of the petitioners, and the subsequest illegal search and seizure of their property by uniformed officers of the law, while acting as Federal agents in the purported enforcement of Federal law, on August 1, 1924; and for the return to the petitioners of the property seized from them, as aforesaid, and turned over to Federal prohibition agents; because said false arrest and illegal search and seizure were made without any warrant and without probable cause, in violation of their constitutional rights to be secure against unreasonable searches and seizures, to not be deprived of their liberty or property without due process of law, and to not be compelled to give evidence against themselves.

2. The trial court erred in admitting, over objections and exceptions of petitioners at the time of trial, the evidence unlawfully obtained as aforesaid;

because the same had been obtained by means of the false arrest of, and the unwarranted and illegal search and seizure from, the petitioners as aforesaid; and timely applications had been made for the return of said property and to quash said evidence.

3. The trial court erred in admitting, over objections and exceptions at the trial, evidence by Trooper Carroll that Mr. Frank Raymo "has the reputation of being a big bootlegger;" because the reputation of Frank Rayno, a stranger to the case, was incompetent and irrelevant; yet such evidence was improperly suggestive to the jury and highly prejudicial against the defendants.

4. The trial court erred in admitting, over objections and exceptions at the trial, testimony by the arresting and seizing officers that they had taken a revolver with cartridges from one petitioner and a pistol with cartridges from the other petitioner; and, at the time of admitting such property in evidence, in stating in the presence and hearing of the jury, "These things are competent evidence on one of the charges in the case, namely, the question of conspiracy" (R., 36), because it was shown that, at the times they were seized, there were also seized valid permits from courts of record, authorizing each of petitioners to carry such arms (R., 40 & 45); and because the lawful carrying of such arms was not evidence of any crime, although the prosecuting attorney, supported by the above quoted ruling, used their admission in evidence with telling effect in his summing up; and the trial court accepted

the matter in the charge, as follows: "that it could not be by a coincidence that two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded; that it could not be a coincidence, that it must have been pursuant to an agreement" (R., 73).

5. The trial court erred in denying the motions of petitioners to direct a verdict of not guilty on each of the counts, as to each of the petitioners, upon the grounds that there was not any legal evidence, or not sufficient evidence, to warrant the jury in finding a verdict of guilty on any of said counts, against either of the petitioners; because all of the evidence presented had been illegally obtained by means of the false arrests and the unwarranted searches and seizures, as aforesaid; and because such evidence as was offered and admitted (illegally, as petitioners claim) at most would but warrant the conviction of petitioner Gambino upon the charge of illegal transportation.

6. The trial court erred in charging the jury as follows: "If that be so, then, as far as the defendant Lima is concerned he is not guilty of conspiracy; he is not guilty of any other offense if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made" (R., 74); because said charge, inferentially and in effect, amounted to a direction to find both of the defendants guilty on the charge of conspiracy, unless the jury believed that

petitioner Lima "was there and that he was in the car an entirely innocent man and in utter ignorance of the fact that any law was being violated or that there were any intoxicating liquors in the car" (R., 74).

Summary of Argument.

The lower court erred in affirming the judgment herein; because said judgment was shown to have been based entirely upon illegal evidence, and there was not any evidence of any kind to sustain the conspiracy charge. By agreement of counsel, and with the consent of the court, this case was simultaneously argued with the Whitney case. It was shown that these officers of the law were acting as Federal agents, for the purpose and with the intent of enforcing the National Prohibition Act, under color of authority granted to them by Section 26 of Title II of said act, according to the custom of State troopers, and as part of their official duties, by order of the governor of New York State; that they were also acting through prearrangement and understanding with Federal prohibition agents, and that pursuant to such prearrangement they turned the property seized and the persons arrested over to said Federal officers for prosecution in Federal court.

These State troopers, while acting as such Federal agents as aforesaid, made this false arrest, and the subsequent illegal searches and seizures, without any warrant or authority in law, without probable cause, and upon mere suspicion, for the purpose and with the intent of enforcing the National Prohibition Act, as

part of their official duties. The provisions of the Fourth and Fifth Amendments to the Constitution, therefore, do apply. The false arrests and imprisonment deprived petitioners of their liberty without due process of law; the searches and seizures were unreasonable, and in violation of the Fourth Amendment, and the use of the illegal evidence, obtained as aforesaid, amounted to compelling the petitioners to give evidence against themselves in a criminal action, in violation of the Fifth Amendment.

The offense of conspiracy was, obviously, charged against the petitioners as a penalty or punishment for insisting on their constitutional rights, as aforesaid. It was at most a constructive offense, and was not supported by any evidence.

Timely and appropriate motions and objections were urged in behalf of petitioners on all of the above grounds, both before the trial court, and especially at the review on writ of error before the Circuit Court of Appeals.

The judgment, being shown to be contrary to law in all the particulars as aforesaid, should have been reversed; yet the Circuit Court of Appeals affirmed the same, without opinion.

ARGUMENT.

POINT I.

New York State Troopers, as officers of the law, are authorized and directed to enforce the National Prohibition Act by Section 26 of Title II of said act, in the same manner and to the same extent as officers paid by the Federal Government.

NATIONAL PROHIBITION ACT, TITLE II.

> "SEC. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction:".

In U. S. *vs.* Story, C. C. A., 5th Circuit, 294 Fed., 517, the court said:

> "The Eighteenth Amendment vests concurrent enforcement powers in the States, through either their legislative bodies or public officers.

National prohibition cases, 253 U. S., 350; 40 Sup. Ct., 486, 64 L. Ed. 946. Section 2 of Title 2 (Comp. St. Ann. Supp. 1923, 101381-2*a*) adopts Section 1014 of the Revised Statutes (Comp. St. 1674) as part of the procedure applicable to the enforcement of the act. Section 1014 provides for the arrest of offenders against the laws of the United States by State magistrates, 'Agreeably to the usual mode of process against offenders in such State.' It seems clear that Congress contemplated the enforcement of the amendment and of enforcement legislation through State officers as well as through Federal officers. Section 26 of the National Prohibition Act authorized 'any officer of the law' to make the arrest of the offender and the seizure of the offending intoxicating liquor and of the vehicle transporting it, and to proceed against the offender 'under the provisions of this title in any court having competent jurisdiction.' It is evident from the language quoted that Congress did not provide for an enforcement in Section 26 by Government officers and Federal courts exclusively.''

POINT II.

This arrest, search and seizure was made for the purpose, and with the intent, of enforcing the National Prohibition Act.

In the instant case the trial court did not permit any oral evidence to be taken on the preliminary motions.

At the time of trial, on cross-examination, the defense counsel attempted to question Trooper Carroll with respect to his knowledge of his rights and duties

in searching cars on such occasions, but counsel for the prosecution objected to such questions, and the court sustained the objections (R., 37). The affidavit of Trooper Carroll, filed in opposition to the preliminary motions, did not purport to controvert or deny any of the allegations contained in the petitioners' affidavits, filed in support of said motions. "Said answering affidavit merely alleged that on the 1st day of August, 1924, the affiant, J. T. Carroll, New York State policeman, and Trooper Travis were driving on the highway from Massena, N. Y., to Hogansburg, N. Y., in a Ford automobile. 'That they met a Buick roadster, which was loaded very heavily. That deponent noticed that the license plates were from a county in the central part of the State. That these facts, together with the fact that the car was heavily loaded and was traveling at a speed of about 25 or 35 miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor. That deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick roadster. That said Buick roadster was being driven at that time by Rosario Gambino, and the occupant was Joseph Lima. That these two were placed under arrest at the time. Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal officers'" (R., 28). Although this affidavit fails to show probable cause for the affiant's alleged belief, yet

it does clearly show that the false arrest was made upon mere suspicion that the Volstead Act was being violated.

On his direct examination at the trial this witness testified, "I have been stationed up along the northern border three years and eight months and have had considerable experience with cars transporting various liquors," and that "cars loaded or hanging that way have usually been loaded with booze coming from the border." That the two troopers then turned their car about and followed defendants' car to Rayno's Garage, in the village of Massena, in front of which the defendants stopped. That witness Carroll then asked defendant Gambino for his registration card, and that same was shown to him. That witness then asked defendant what he had in his car and was told by defendant to find out. That witness then asked for the key. That defendant refused to give him the key. That witness then took his car and shook it and heard the bottles and asked how many cases he had on. That defendant told him to find out. That defendant Lima was meanwhile walking towards the garage. That trooper Travis went and brought him back to the car. That Gambino got into the Ford car with witness and was driven to the police station (R., 29). From which it again clearly appears that the arrest was made solely upon suspicion that the car might be carrying contraband liquor. "That after leaving the garage the two troopers and the defendants drove to the police station at Massena, witness driving the Buick roadster with Lima riding with him, and Travis driving the

Ford with Gambino riding beside him. That on arriving at the police station witness again asked for the key and was told to go ahead and find it; so he did and found it in the left hand side pocket of the car. That he opened the rear end of defendants' car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck" (R., 31). "That he thought he had now told the court and jury everything that had happened on this occasion. That he then arraigned these defendants before the United States Commissioner and defendants waived examination and were held by the Commissioner" (R., 34). "That the car was then taken 'behind the police station, until turned over to the agents of the Border Patrol'" (R., 41). "That the car was turned over to the Federal officer completely unloaded and reloaded after such delivery" (R., 42). Trooper Travis testified, "That the car seemed to be heavily loaded, and the rear fender was riding close to the wheels, in the way that generally indicates a loaded car. That the troopers then turned around and followed the defendants' car" (R., 35). "That they overtook defendants' car in front of Rayno's Garage in the village of Massena. That defendant Lima jumped out of the Buick car and ran inside of the garage, followed by witness, who overtook him in the garage and brought him back. That Gambino was still in the Buick car. That no effort had been made to get into the car that he knew of. That he then took Gambino in the Ford car and drove to the police station at Massena. That Sargeant Carroll and defendant Lima went to the police station in

the Buick car. That he did not recall hearing any conversation in front of the garage. That at the police station the two loaded guns were taken from Gambino and Lima, and cartridges and some money, and they showed their revolver permits. That the car and other property seized from defendants were turned over to inspector Robillard. That witness assisted in unloading the bottles from defendants' car" (R., 45, 46). By agreement of counsel and with the consent of the circuit court of appeals this case was argued simultaneously with the Whitney case at the review on writ of error. It was there urged in behalf of these petitioners (in addition to the foregoing admissions of the arresting officers as to their reasons for making the false arrest and the subsequent illegal searches and seizures, the turning the seized property over to Federal officers, and arraigning defendants before a United States Commissioner) that these acts of these officers of the law were not their individual misconduct, but were official acts, done as part of their official duties, under orders of the Governor of the State of New York, to aid in the enforcement of the National Prohibition Act, under authority granted to "any officer of the law" by Section 26 of Title II of said act. That said acts were also done under instructions to State troopers, by Federal authorities, that they do not need any search warrant and that "our uniform represents the search warrant" (Whitney, R., 9). That the property seized and the persons arrested were turned over to Federal authorities for prosecution in Federal court, according to the custom of, and instructions to, State

troopers for enforcing the National Prohibition Act (Whitney, R., 9).

It was further urged in behalf of the petitioners that brief of the defendant in error, at page 6, admitted and alleged as follows:

> "It is common knowledge that the Governor of this State, although urging successfully the repeal of the Mullen-Gage State Prohibitory Act, and even now in his recent message, has urged the enforcement of the National Prohibition Act, although opposed to the statute. He announced before this case arose that State officers should take part in the enforcement of the National Prohibition Act, and this action of our State executive is a matter of current history, of which courts have judicial knowledge, and take judicial notice."

POINT III.

This false arrest and illegal search and seizure were made without warrant or authority in law, without probable cause, and upon mere suspicion, by authorized agents of the Federal Government, for the purpose of enforcing Federal law.

The petitioners' claim, that the arresting officers acted without warrant, was not controverted (R., 26). The facts alleged in the answering affidavit as grounds for making the arrest, and the subsequent searches and seizures, are merely, "That the license plates were from a county in the central part of the State." "That the car was heavily loaded," and "was traveling at a

speed of about 25 or 35 miles per hour" (R., 27). There is no suggestion of crime in any of those facts. Not even the court by its warrant could authorize a search and seizure under them. Much less could an officer, acting without warrant, be authorized. Nor is the matter helped by the affiant's statement that "from his experience which he had had with the activities of transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor." Since the affiant does not disclose any facts of his experience, it adds nothing to the basis of his alleged belief. Clearly such belief is not warranted by the facts stated.

In his testimony at the time of trial Trooper Carroll, obviously in the effort to strengthen the case by alleging additional grounds for the false arrest and subsequent illegal searches and seizures, said that before making the arrests he shook defendant's car and heard bottles rattle (R., 29). On cross-examination this witness testified that Gambino invited him to find out what was in the car (R., 37). That Gambino asked him if he couldn't fix it up and witness said, "No, of course not" (R., 38). That he "kind of lifted the back of the car and let it drop and you could hear bottles clink" (R., 38). That he told the two defendants and his partner, Trooper Travis, that he heard bottles clink at the time. That his partner was there when he told the two defendants about it. That there were also other people standing around, but witness didn't know whether they heard it (R., 39). It is significant to note that although Trooper Travis testified in the case on

two different days thereafter, he did not attempt to corroborate any of this testimony by witness Carroll. Instead thereof, he testified "That he did not recall hearing any conversation in front of the garage" (R., 45). In his answering affidavit witness Carroll omitted to mention anything about hearing bottles clink or rattle, and in his cross-examination testified "That at the time he opened the rear compartment of defendant's car at the police station, he noticed that the bottles were packed in well with excelsior or something like that, so that they would not break against one another, but not packed in tightly, and not loosely, but loose enough to rattle. That he took some of the bottles out of the rear compartment and saw some others taken out, but did not see them all taken out, and saw an attempt made to put them back in, but that all of them would not go back in, because they were not packed the same way, and some of them were put in the front seat of the car" (R., 41).

Again this witness, Carroll, testified that the place at which the arrests were made was known to him as Rayno's Garage. That Frank Rayno was the proprietor of the same and had the reputation of being a bootlegger (R., 31). In these additions to his testimony this witness was not corroborated in any way, but was flatly contradicted by the affidavits of N. A. Santamour and George Aubrey, showing that the place was known as "the Reno Garage, of which Santamour was the proprietor and said Aubrey was an employee" (R., 25).

In overruling petitioners' objections to Carroll's

testimony about the reputation of "Frank Rayno," the trial court said:

> "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the jury will understand the objection is overruled" (R., 30).

From the above-quoted ruling it seems that even the trial court did not consider that there was any probable cause for believing that the law was being violated, known to either of the arresting and seizing officers and that their testimony merely alleged grounds for suspicion.

As shown in Point I, these State troopers were authorized agents of the Federal Government for enforcing this particular Federal law.

As shown in Point II, this arrest, search, and seizure was made by them for the purpose, and with the intent, of enforcing the National Prohibition Act.

POINT IV.

The restrictions of the fourth and fifth amendments to the Constitution of the United States apply to any exercise of the power of the Government through any of its authorized agencies.

Boyd *vs.* United States, 116 U. S., 616:

This Court, in speaking of Lord Camden's judgment in the case of Entick *vs.* Carrington and three other

King's Messengers, 19 Howells State Trials, 1029, said, at page 626:

> "The law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the Mother Country. * * * As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment."

At page 627 this Court quotes from said judgment as follows:

> "'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.'"

On page 630 this Court said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

Adams *vs.* New York, 192 U. S., 585:

At page 598 this Court said:

> "The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the Boyd case, *supra*. The security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpation when attempted."

Weeks *vs.* United States, 232 U. S., 383:

At page 392 this Court said:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

At page 394 this Court also said:

> "In Adams *vs.* New York, 192 U. S., 585, this Court said that the Fourth Amendment was intended to secure the citizens in person and property against unlawful invasion of the sanctity of the home by officers of the law acting under legislative or judicial sanction. This pro-

tection is equally extended to the action of the Government and officers of the law acting under it (Boyd case, *supra*). To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

Gouled *vs.* United States, 255 U. S., 298:

At page 303 this Court said:

"The Fourth Amendment reads, 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.' The part of the Fifth Amendment here involved reads, 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and the court (in Boyd *vs.* United States, 116 U. S., 616; in Weeks *vs.* United States, 232 U. S., 383, and in Silverthorne Lumber Co. *vs.* United States, 251 U. S., 285) have declared the importance to political liberty and to the welfare of our country of due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security,

personal liberty and private property;' that they are to be regarded as of the very essence of constitutional liberty, and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to writ of *habeas corpus*, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

Carroll *vs.* United States, 45 S. Ct., 280.

At pages 283-284 this Court said:

"(2) On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

at page 285:

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstance such search may be made. It would be intolerable and unreasonable

> if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

at page 286:

> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

and at page 287:

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

Again at page 288 this Court quotes with approval its own former definition of probable cause as follows:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

By the foregoing authority it is clearly made to appear that suspicion is not enough to justify a search and seizure without warrant; that there must be probable cause, *i. e.*, facts and circumstances known to the seizing officer such as would warrant a man of prudence and caution in believing that the law was being violated.

That the known facts and circumstances in the Carroll case, as marshaled and recited in the learned opinion in that case, was held by this Court to constitute probable cause for making that particular search and seizure, certainly does not authorize the judgment of the lower Court here complained of. The opinion in the Carroll case distinctly states at page 288:

> "In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

It has been shown in Point I that these officers were, by Federal statute, authorized agents of the Government for the enforcement of the National Prohibition Act.

In Point II that they here acted with the purpose and intent of enforcing this Federal law.

In Point III that they here so acted illegally, without warrant, without probable cause, and upon mere suspicion.

Can it be said in reason, that, because these authorized agents of the Federal Government happened also to be State officers, they were privileged to violate the constitutional rights of citizens? Can the Government give legislative sanction to such officers, and then be heard to disclaim responsibility for the acts done under color of such authority? Is the claim of these officers that they do not need any search warrant tenable? What need remains for any search warrant, if these State officers may search *ad libitum*, without warrant? Why should prohibition agents bother with search warrants if State officers may do without them, especially if such State officers customarily turn the property seized over to them, and Federal courts permit the use of evidence so obtained?

POINT V.

There was not any evidence in the case to support the conspiracy charge.

The mere fact that petitioner Lima was riding in Gambino's car at the time of the unlawful search and

seizure, standing alone, is not evidence of any crime. It is consistent with the theory of innocence, as well as with the theory of guilt; and, at most, is but a suspicious circumstance. If aided by adroit suggestions of the prosecution, and the court, the imagination of zealous jurymen might easily construct a fabric of conspiracy upon the foundation of suspicious circumstance. The further circumstance that each of these petitioners was at the time bearing arms, though lawfully, with permit, is but further ground for suspicion; suspicion, perhaps, of criminal conspiracy, as well as of other possible crimes.

In the instant case the court stated, in the presence and hearing of the jury, in reference to the revolver and pistol and cartridges seized:

> "That these things are competent evidence upon one of the charges in the case, namely, the question of conspiracy" (R., 36).

Later the court charged the jury:

> "The Government says * * * that it could not be by a coincidence that these two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded; that it could not be a coincidence, that it must have been pursuant to an agreement.
>
> "If you are satisfied beyond a reasonable doubt that there was an agreement and that these men were there by this agreement and that they were doing something in carrying out that

agreement, why, then, you may find them guilty of conspiracy" (R., 73).

There was not any other evidence, purported evidence, or suspicious circumstance in the case, which was urged or claimed in support of the charge of conspiracy. On these two suspicious circumstances, then, was the conviction of conspiracy founded.

The brief of the defendant in error, before the circuit court of appeals, urged in addition that one of the State troopers testified that when the Buick car stopped in front of the garage, Lima jumped out and ran into the garage. That this was evidence of an attempt to escape on the part of Lima and was an indication of guilt. But no such claim was made or urged at the time of the trial, either by the prosecuting attorney or by the trial court. The grounds there urged as supporting the charge of conspiracy were merely the two aforesaid suspicious circumstances, as is clearly indicated by the above quotation from the charge. Furthermore, the testimony of the other trooper on the subject was that petitioner Lima walked towards the garage. "That defendant Lima was meanwhile walking towards the garage" (R., 29).

In Davidson *et al. vs.* U. S., 247 Fed., 285, and in Winsor *vs.* U. S., 286 Fed., 51, it was held that while it is not essential to establish conspiracy that actual proof be offered of a definite plan or agreement entered into by conspirators, yet the prosecution must at least show a concert of action in the commission of an unlawful act or other facts and circumstances from

which the natural inference arises that the unlawful overt act was in furtherance of a common design intent and purpose of the alleged conspirators.

In Stafford *et al. vs.* U. S., 300 Fed., 537, evidence that two defendants were riding in an automobile in which intoxicating liquor was being transported, and when the car was wrecked the driver attempted to escape, was held not sufficient to support conviction of conspiracy to transport liquor and sufficient only as to the driver to support conviction for unlawful transportation. The court, in its opinion, said:

> "The defendants' plea of not guilty placed the burden upon the Government to establish the guilt of the defendants upon each count of this indictment beyond a reasonable doubt. To meet this burden the Government offered as witness the two prohibition enforcement officers who made the arrest. These witnesses testified that they were driving along the highway in an opposite direction from the direction in which these defendants were going; that when they passed the defendants they saw something covered over in the rear part of the automobile, and for that reason turned and followed it. The defendants or one of them, drove the Buick roadster at about 55 miles an hour without slackening for curves, and in making a reverse curve the rear end of defendant's car left the roadway and struck the fence; that the defendant Stafford, who it is claimed was owner of this car, or at least was driving it, then jumped out of the car and started to run away. One of the officers shot in the air to frighten him and he

stopped and came back toward the car. The defendant Shelton was standing by the side of the car when the officers reached him. After arresting both defendants the officers searched the car and found therein 16 kegs of whiskey containing 5 gallons each.

"The Government offered no other or further evidence to prove the charge of conspiracy, except that these two defendants were riding in the car in which the intoxicating liquor was being transported, and when the car was wrecked Stafford attempted to escape. To sustain a charge of conspiracy the Government need not furnish direct proof of the unlawful plan or agreement, but such charge may be sustained by evidence showing a concert of action in the commission of an unlawful act, or by proof of other facts from which the natural inference arises that the unlawful overt act was in furtherance of a common design of the alleged conspirators. Winsdor *vs.* U. S. (C. C. A.), at 286 Fed., 51.

"In Windsor *vs.* U. S., *supra*, this Court sustained a conviction for conspiracy where a person riding in, but not driving a car in which intoxicating liquors was being unlawfully transported, jumped from the car and fled from the arresting officer, upon the theory that flight indicated guilty knowledge, but in this case it was the driver of the car that attempted to escape. While it does not clearly appear that Stafford was the driver of this car, nevertheless that fact was conceded in the argument of the case, and the trial court so stated in its opinion upon the motion to quash. Stafford, as the driver

of the car, must be held to have had knowledge that it was then and there being used for the unlawful transportation of intoxicating liquors. There is no evidence whatever tending to show when or under what circumstances Shelton got into this car. He may have had knowledge at the time he got into the car of the unlawful purposes for which it was then being used, or he may have acquired such knowledge after he became a passenger in the car and still have had no connection whatever with the unlawful project. The fact that he was riding in the car with Stafford is a suspicious circumstance, but suspicious circumstances do not constitute proof of guilt beyond a reasonable doubt. On the other hand, he may not have had any knowledge whatever as to the contents of the car, and for that matter may have been an entire stranger to Stafford and riding in the car at his invitation.

"In the opinion of this Court, the evidence offered on the part of the Government in this case is not sufficient to furnish a substantial basis for a finding by the jury, beyond a reasonable doubt, that Shelton had entered into a conspiracy with Stafford for the commission of this offense, or that he was aiding or participating in the commission thereof.

"For the reasons stated, the judgment of the district court is reversed as to Shelton on both counts, and as to Stafford upon the first count. The cause is remanded for sentence of Stafford upon the second count, and for further proceedings in accordance with this opinion."

All of which is respectfully submitted in support of the petition, in the earnest hope that the prayer thereof may be granted by this Honorable Court.

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